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IN THE

Supreme Court of the United States

October Term, 1965
No. 653

ERVIN RAHMOELLER,

Petitioner,

vs.

PEOPLE OF THE STATE OF CALIFORNIA.

VOLUME II.

Appendix to Petition for a Writ of Certiorari to the Superior Court of the State of California, in and for the County of Los Angeles.

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Memorandum Opinion and Judgment.

Appellate Department of the Superior Court of the State of California for the County of Los Angeles.

People of the State of California, Plaintiff and Respondent, vs. Gardena Dairy Farms, et al, Defendants, Irvin Rahmoeller (true name Ervin Rahmoeller), Defendant and Appellant. Superior Court No. CR A 6222. Trial Court No. M 59687.

Appeal by defendant Ervin Rahmoeller from judgment of the Municipal Court of the South Bay Judicial District, William B. Keene, Judge. Affirmed.

For Appellant—Messrs. Ernest George Williams and James J. Williams.

For Respondent—Evelle J. Younger, District Attorney, Harry Wood, Deputy District Attorney.

Defendant Rahmoeller appeals from the judgment pronounced against him for a violation of Gardena City Ordinance No. 482 (as adopted November 13, 1958), a misdemeanor, following a conviction by a jury in a trial by jury.

Rahmoeller is not the owner of the land or buildings and permanently affixed equipment on the premises commonly known as 2013 Redondo Beach Boulevard, in the City of Gardena, which are the premises in question; he holds a leasehold interest scheduled to expire April 1, 1967, as a lessee (sub-lessee according to his brief) of said premises. Both prior and subsequently to the cutoff date of December 1, 1963, he continuously owned and maintained a herd of approximately 180 cows, on a R-1 portion of an area zoned R-1 and C-3, which was a nonconforming use until said cutoff date.

Defendant was convicted for violating that portion of the zoning ordinance which provided in Section 2 thereof:

> "That from and after December 1, 1963, it shall be unlawful for any person, partnership or corporation, as principal, agent, employee, or otherwise, to maintain or cause to be maintained or kept upon any premises in the City of Gardena, any bulls, steers, cows, calves or any bovine animal of any kind."

The case, therefore, is not one dealing with a violation of the usual type of criminal ordinance, but one that concerns a criminal sanction for the purposes of enforcing a zoning ordinance prescribing a five-year period of amortization for the termination of a nonconforming use. A condition of the summary probation granted defendant was "all bulls, steers, cows and bovine animals kept upon the premises located at 2013 Redondo Beach Boulevard in the City of Gardena, are to be removed in their entirety on or before, but not later than, March 1, 1965." It is distinguishable, therefore, from a constitutional attack upon a normal police ordinance such as that considered in *People v. Amdur* (1954) 123 Cal. App. 2d Supp. 951, cited and relied upon by the appealing defendant.

The trial court dismissed the action as to defendant Gardena Dairy Farms, a corporation, when it developed in course of trial that its operations were confined to the maintenance of a store selling dairy products on the front of the premises in question, and that the herd was owned and maintained by defendant Rahmoeller, who had no financial interest in said co-defendant corporation.

Rahmoeller formally assigns as errors the following:

1. He was prejudiced by the trial court's forbidding his introduction of evidence before the jury that the five-year period of amortization was unreasonable, arbitrary and discriminatory.

2. As he was being prosecuted for a public nuisance, the prosecution should have been laid under Penal Code Section 370 instead of under the ordinance.

3. A local municipality is acting *ultra vires* where it declares an industry operating in conformance with state regulation and under state supervision a public nuisance.

4. The prosecution has the burden of proving the reasonableness of the five-year amortization period as a part of the *corpus delicti* of the offense charged against him.

Appellant Rahmoeller first raised the issues of preemption and constitutionality that envelope the grounds of error assigned by motions to dismiss, prior to the selection of the jury. The motions were denied.

Aside from appellant's claim that the ordinance was invalid as local legislation intruding into areas covered and preempted by state-wide statutes, the nub of his grievance is that he was denied a collateral attack on the constitutionality of the legislative action of the City Council of the City of Gardena in finding as set forth in Section 1, inter alia, that the maintenance of a number of bovine animals within the city limits was a nuisance and that a five-year period was a reasonable amortization period within which to terminate defendant's nonconforming use of operating a dairy and maintaining a herd of approximately 180 cows at 2013 Redondo Beach Boulevard, in the City of Gardena.

Appellant sought to execute his collateral attack by producing witnesses who would testify before the jury relative to the questions of whether defendant's dairy operation was conducted in a manner to constitute a nuisance and whether the five-year period of amortization was reasonable; and then to have the jury determine the issue of constitutionality, which the trial judge forbade.

Assignments of error labelled 2 and 3 above are predicated upon a theory of preemption by the State. These may be answered that this action is not a prosecution for a public nuisance *per se*. The declaration by the City Council in Section 1 of the ordinance that "the maintenance of animals as aforedescribed (any numbers of bulls, steers, cows, calves or any bovine animals within the city limits) is a public nuisance" is merely one of those incidental or foundational facts upon which the City Council predicated its legislative judgment that the five-year period of amortization of the nonconforming use was reasonable. The mere fact that nuisance is a factor in the enactment of zoning ordinances does not convert litigation based on the ordinance into one for the abatement of a public nuisance. (See: *Jones v. City of L.A.* (1930) 211 Cal. 304, 316; *Livingston Rock and Gravel Co. v. County of L.A.* (1954) 43 Cal.2d 121, 125.)

Provided that it meets the constitutional test of reasonableness, a municipality can adopt zoning ordinances rendering it impossible to conduct a business or industry which is not in and of itself a nuisance, where changing conditions of the community render it necessary or advisable in the interests of health, safety, and public welfare. (*City of L.A. v. Gage* (1954) 127 Cal.

App.2d 442, 451, 453; *Miller v. Bd. of Public Works* (1925) 195 Cal. 477, 487.)

Whether or not a certain use of land constitutes a public nuisance is only one factor to be weighed in determining what is a reasonable period for amortizing a nonconforming use of that land. A rezoning regulation constitutionally may provide for an immediate termination of a nonconforming use if a planning commission upon a public hearing, held upon notice, finds the nonconforming use to be "detrimental to the public health or safety, or so as to be a nuisance" (*Livingston Rock etc. Co. v. County of L.A.* (1954), *supra*, 43 Cal.2d 121, 128. See also: *Hadacheck v. Sebastian* (1915) 60 L.ed 348, 356-357 (239 U.S. 394) affirming *Ex parte Hadacheck* (1913) 165 Cal. 416.)

The trial judge correctly ruled that reasonableness of the five-year amortization period was neither a part of the *corpus delicti* nor a question for the jury. In *Wigmore on Evidence* (3rd ed.) Vol. IX, Sec. 2555 (d), p. 522, we find that:

> "Where a LEGISLATIVE ACT is argued to be UNCONSTITUTIONAL, and *this is to depend upon the unreasonableness,* or lack of possible reasonableness, of the law in its purpose or operation, and thus the external facts furnishing the possible legislative motive or the possible actual effect must be considered, *this incidental question of fact is not for the jury, but for the Court.* Hence, no testimony, of experts or others, would be admitted for the jury." (Emphasis by italics added.)

Appellant's counsel in contending that "reasonableness is a question of fact" fails to recognize that this

is not the ordinary question of fact, but is what Justice Tobriner characterizes as "a constitutional fact" (*Zeitlin v. Arnebergh* (1963) 59 Cal.2d 901, 910) which "is a question of fact mixed with a determination of law". And when we speak in the context of what are the respective functions of judge and jury, such questions of "constitutional facts" are a question of law for the Court and not for the jury.

It has been well established that the question of the constitutionality of a statute is a question for the court and not for the jury. (*People v. Love* (1921) Sup.Ct. Ill., 131 N.E. 809, 811 (298 Ill. 304, 16 ALR 703); *Sisson v. Buena Vista County* (1905) 104 N.W. 454, 458, 461 (128 Iowa 442); and see: *Zeitlin v. Arnebergh, supra,* 59 Cal.2d 901, 908-909; 16 Am.Jur.2d (Const. Law) Sec. 171, p. 338.) In California it has been held that the rules of construction of statutes apply to the construction of ordinances (*Evola v. Wendt Construction Co.* (1959) 170 Cal.App.2d 21, 24) and that the construction of an ordinance is for the court and not for the jury (*Reid & Sibell v. Gilmore & Edwards Co.* (1955) 134 Cal.App.2d 60, 72). It has been said that "(t)he *constitutionality* and construction of a statute are matters of law" (*People v. Kaufman* (1920) 49 Cal.App. 570, 572) and Penal Code Section 1124 provides that matters of law arising in the course of a criminal trial are for the court to decide.

Courts in other states have held also that the question of the reasonableness of a zoning ordinance within the framework of judge and jury functions constitutes a question of law for the court and not for the jury. (*Long v. City of Corpus Christie* (1958) Ct. of Civ. App., Texas, 315 S.W.2d 24, 27, 28, 30; *City of Dallas*

v. Rosenthal (1951) Ct. of Civ.App., Texas, 239 S.W. 2d 636, 647; *Duggins v. Bd. of County Com'rs.* (1956) 293 P.2d 258, 259, 261, 262 (179 Kan. 101); *O'Connor v. City of Moscow* (1949), Sup.Ct. of Idaho, 202 P.2d 401, 405, (69 Ida. 37).)

The ruling of the trial judge in denying the motions to dismiss before the offer of any evidence was proper, in view of the presumption of the validity of legislative and quasi-judicial actions which requires no extensive citations of authority.

Defendant Rahmoeller's request to have the jury decide whether his dairy and herd maintenance operations constituted a nuisance and whether the five-year period was a reasonable period of amortization, in the light of the foregoing authorities, is not supported by the law.

This is adequate to affirm the judgment below within the legal framework in which this appeal comes before us. However, because of gravity of the questions involved (the welfare of the public in the City of Gardena and the size of the amount claimed to be invested by defendant), we have proceeded further to satisfy ourselves that defendant Rahmoeller is not being unfairly deprived of his day in court to have a judicial determination of his claim of unconstitutionality of the ordinance on the theory that the five-year period of amortization was unreasonable.

We have further concluded that the trial judge was correct in denying the motions to dismiss as a matter of law upon the Gardena City Attorney calling to his attention matters of which he is permitted to take judicial notice. This legislation was grounded upon the authority granted the City Council of the City of Gar-

dena under Govt. Code Sections 65800 and 65807. Since the defendant has no interest in the permanent structures and improvements which normally call for an extended period of amortization and his interest is only that of a lessee (or sublessee as his counsel terms him in his brief), the court noting only what is contained in the four corners of Ordinance No. 482 could quite properly have concluded that the ordinance was valid as a matter of law in light of such cases as: *City of L.A. v. Gage* (1954), supra, 127 Cal.App.2d 442 (five-year amortization of a wholesale and retail plumbing business held constitutional), *In re Hadacheck* (1913), supra, 165 Cal. 416, aff'd. *Hadacheck v. Sebastian* (1915), supra, 239 U.S.394, 60 L.ed. 348 (ordinance prohibiting a pre-existing brickmaking business following a finding that it was a nuisance upheld); *Livingston Rock etc. Co. v. County of L.A.* (1954), supra, 43 Cal.2d 121 (immediate termination upon planning commission hearing on notice that operation was a nuisance held constitutional where plant cost of $18,000.00 and $80,000.00 worth of mixer trucks were involved); *Spurgeon v. Bd. of Com'rs.* (1957) 317 P.2d 798, 806 (181 Kan. 1008) (2-year amortization for removal of automobile wrecking business held reasonable; building and fixtures worth $18,000.00 and moving expenses $4,500.00); *Standard Oil Co. v. City of Tallahassee* (1950) CCA 5th, 183 F.2d 411, cert. den. 340 U.S. 892 (10-year amortization of gasoline service station upheld); *City of Seattle v. Martin* (1959) Sup.Ct. Wash., 342 P.2d 602 (54 W.2d 541) (1-year period to discontinue use of a lot for repair of construction equipment upheld); and *State ex rel. Dema Realty Co. v. McDonald* (1929) 121 So. 613, 616, 617 (168 La. 172), cert. den. 280 U.S. 556 (1-

year period to terminate nonconforming use of small drug store upheld). And the court probably noted that actually 6 years, 2 months, and 5 days had elapsed from the date of adoption of the ordinance to the date of trial.

The trial judge by judicial notice could have noted that the findings of "nuisance" and "reasonableness" of the five-year period in Section 1 of the ordinance were well supported. He could have taken judicial notice of the records of the City Planning Commission disclosing consideration of the issues defendant seeks to raise again. These records are kept pursuant to the mandate of the law. (*Watson v. Los Altos School District* (1957) 149 Cal.App.2d 768, 772-773; Govt. Code Sec. 65402; Gardena Municipal Code Sec. 10-1.07). The public records of the City Council concerning the passage of this ordinance, including the many complaints from inhabitants of Gardena on file therein, are also subject to judicial notice. The trial court was entitled to take judicial notice of what is general knowledge within the limits of its territorial jurisdiction (*People v. Tossetti* (1930) 107 Cal.App. 7, 10); of the increase in population (*In re Simpson* (1923) 62 Cal. App. 549, 555; *People v. Spring Valley Co.* (1952) 109 Cal.App.2d 656, 663); of such things as the need for redevelopment (*Redevelopment Agency v. Hayes* (1954) 122 Cal.App.2d 777, 806); and that the councilmen had personal knowledge of the physical condition of the premises concerned and the neighborhood characteristics, which constituted independent evidence in support of their findings (*Siller v. Bd. of Supervisors* (1962) 58 Cal.2d 479, 484). Even if the trial court did not in fact take judicial notice of the things

or items noted above, this court upon review can do so and give proper effect to such facts subject to judicial notice. (*Taliaferro v. County of Contra Costa* (1960) 182 Cal.App.2d 587, 592; *People v. Tossetti* (1930), supra, 107 Cal.App. 7, 13.)

Against these judicially noticed facts buttressing the findings of the City Council, the evidence proffered by the defendant at most could only have created a conflict in the evidence (assuming arguendo that a municipal court is a proper forum for reviewing the validity of legislative action adopting a zoning ordinance; it certainly has no jurisdiction to issue an injunction pertinent to this case or extraordinary writs mentioned above (C.C.P. Sec. 89)) in face of the well-established law that a person attacking the reasonableness of a zoning ordinance has the burden of proving his claim (*National Advertising Co. v. County of Monterey* (1962) 211 Cal.App.2d 375, 381; *City of L.A. v. Gage* (1954), supra, 127 Cal.App.2d 442, 450) and that where "the reasonableness of the ordinance is fairly debatable, the legislative determination will not be disturbed" by the courts. (*Hamer v. Town of Ross* (1963) 59 Cal.2d 776, 783; *Consolidated Rock etc. Products Co. v. City of L.A.* (1962) 57 Cal.2d 515 522-523; *Anderson v. City Council* (1964) 229 Cal. App.2d 79, 91, and *Wilkins v. City of San Bernardino* (1946) 29 Cal.2d 332, 338-339.)

Further in this case the Gardena Dairy Farms was notified by letter from the Gardena City Attorney dated March 29, 1963, and delivered March 30, 1963, that bovine animals had to be removed from the premises at 2013 Redondo Beach Blvd., by December 1, 1963, by terms of Ordinance No. 482. Thereafter, the Gar-

dena Dairy Farms through its attorneys requested an extension of the amortization period beyond December 1, 1963. The City Council held a hearing, upon notice, to act upon the application for extension at which defendant Rahmoeller was present in person and with counsel (the same counsel as that for Gardena Dairy Farms), and then denied the application. Defendant Rahmoeller further received a written notice of this denial of extension on November 30, 1963, from the Gardena City Attorney; and the letter notice further reiterated notice to remove the "cows, cattle and other bovine animals . . . by midnight, December 1, 1963".

Following this adverse decision of the City Council and notice of its action, defendant Rahmoeller failed to take any steps (as his counsel on oral argument admitted) open to him on direct appeal or review, whereby he could have obtained a judicial ruling on the issues now sought to be raised by him, by mandamus (*Siller v. Board of Supervisors* (1962), supra, 58 Cal.2d 479), by certiorari (*Livingston Rock etc. Co. v. County of L.A.* (1954), supra, 43 Cal.2d 121, 128), by injunction (*Metcalf v. County of L.A.* (1944) 24 Cal.2d 267), or by declaratory relief (*Consolidated Rock etc. Co. v. City of L.A.* (1962), supra, 57 Cal.2d 515) if the action of the City Council is considered legislative action.

On the other hand, if the denial of extension is deemed a quasi-judicial action then according to *Fascination, Inc. v. Hoover* (1952) 39 Cal.2d 260, 265 and *Jenner v. City Council* (1958), 164 Cal.App.2d 490, 499-500, defendant is barred from introducing at a judicial review hearing evidence not presented to the quasi-judicial body.

But in any event, defendant Rahmoeller took no action until the criminal complaint in this action was filed against him on August 24, 1964, eight months and six days later. Even at that late date, if he were sincere in his belief of unconstitutionality, he could have sought judicial review and relief by a writ of prohibition in the superior court with a direct line of appeal to the highest court of this state (*Alves v. Justice Court* (1957) 148 Cal.App.2d 419), but for reasons best known to him and his counsel he chose not to do so.

It has been held in other states that where one fails to take an available direct appeal from a denial of an extension of the period of a nonconforming use, he cannot raise the issue of constitutionality of a zoning ordinance by collateral attack in a criminal misdemeanor action in a court of limited jurisdiction. (*Iannella v. Johnson* (1948) Sup.Ct. of N.J. 56 A.2d 894, 896 (136 N.J. Law 514), aff'd. 61 A.2d 237 (137 N.J. Law 659), appeal dismissed 336 U.S. 932, 69 S.Ct. 749, 93 L.ed. 1092; and see: *Commonwealth v. DeBaldo* (1951) 82 A.2d 578, 580-581 (169 Pa. Super. 363); cf. *Laque v. State* (1955) 113 A.2d 893, 897 (207 Md. 242) cert. den. 350 U.S. 863, 76 S.Ct. 105, 110 L.ed. 765.) There are good policy reasons behind such a rule which appears to have some recognition in California. (See *Zeitlin v. Arnebergh* (1963), supra, 59 Cal.2d 901, 907.) Where the welfare of a large number of people are affected and the amounts of property and investment involved exceed greatly the jurisdiction of the trial court, it would appear to be good public policy to have

the issue of constitutionality of a zoning ordinance litigated in a court of general jurisdiction with a direct line of appeal to the highest court of the state.

Some of the same policy considerations are probably behind another rule that pertains to the various civil remedies which were open to the defendant, and that is that in civil proceedings, the general rule is that the question of the constitutionality of a statute or an ordinance must be raised at the earliest possible moment, or else it is deemed waived. (*Jenner v. City Council* (1958), supra, 164 Cal.App.2d 490, 498; *Preston v. Municipal Court* (1961) 188 Cal.App.2d 76, 82; *Hershey v. Reclamation District* (1927) 200 Cal. 550, 564; 11 Cal.Jur.2d 404.)

The City Council records further reflect that an attorney, Sidney Bleifeld, representing both the Gardena Dairy Farms and the Meadow Park Dairies presented defendant's side of the case before the City Planning Commission on August 19, 1958, and then appeared before the City Council of the City of Gardena on October 14, 1958, when it was conducting a hearing with reference to the adoption of the five-year amortization period. The records reflect that he stated in part at that time:

> ". . . with reference to the proposed Ordinance pronouncing the 'death sentence', *a period of five years is more reasonable than the original three years proposed.* However, the existing leases on the two dairies should be taken into consideration, which in one instance is for eight years. . . ." (Emphasis added.)

From this it may be inferred that the Gardena Dairy Farms had bargained for and obtained a five-year period in lieu of the three-year period originally proposed, and having received this five-year reprieve they accepted its benefits and took no further action towards a judicial determination. One who accepts the benefits of a statute, even if it be unconstitutional, is estopped from later questioning its constitutionality (*Higbie v. County of L.A.* (1941) 47 Cal.App.2d 281, 289; *Hershey v. Reclamation District* (1927), supra, 200 Cal. 550, 564; 11 Cal.Jur.2d 405; and see: *County of Sacramento v. City of Sacramento* (1946) 75 Cal.App.2d 436, 447-449), which in this case defendant sought to do by collateral attack in a court of limited jurisdiction 6 years, 2 months and 5 days after the adoption of the ordinance and under which it received sanctuary for five years. It will be approximately six years and nine months when the judgment of this court becomes final. Defendant Rahmoeller made no representation that he did not have notice of the proceedings leading to the adoption of the ordinance in question nor of its contents which were published in the Gardena Valley News as was required by Govt. Code Section 50021.

We conclude, therefore, that defendant Rahmoeller has not been unfairly deprived of his day in court in which to litigate the issues of constitutionality and reasonableness of the amortization provisions of Ordinance 482 the City of Gardena, and its section 2 under which he was convicted. The economic detriment to the

defendant is regrettable but it is the usual concomitant with almost every exercise of the police power as appellate courts have reiterated in their opinions ever since zoning law litigation has become common.

The judgment is affirmed.

Dated July 22, 1965.

Aiso, *Presiding Judge*

We concur:

Faries, *Judge*

Breitenbach, *Judge*

END